Supreme Court of the United States.

OCTOBER TERM, 1951.

No. 522.

JOSEPH BURSTYN, INC.,

Appellant,

—against—

LEWIS A. WILSON, Commissioner of Education of the State of New York, *et al.*,

Appellees.

MOTION OF AMERICAN BOOK PUBLISHERS COUNCIL, INC., FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*, AND BRIEF OF *AMICUS CURIAE*.

ARTHUR E. FARMER,
Counsel for American Book Publishers Council, Inc., as Amicus Curiae.

STERN & REUBENS,
Of Counsel.

THE COURT PRESS, N. Y. C.

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Appellees.

Motion for Leave to File Brief as *Amicus Curiae*.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Now comes AMERICAN BOOK PUBLISHERS COUNCIL, INC., and respectfully moves this Court, pursuant to Rule 27, paragraph 9 of the Rules of this Court, for leave to file the accompanying brief in this case, *amicus curiae*. The consent of the attorney for the appellant herein to the filing of this brief has been filed with the Clerk of this Court. The consent of the attorney for the appellees has been requested but has been refused. The interest of American Book Publishers Council, Inc. (hereinafter for convenience referred to as the "Council"), and its reasons for asking leave to file a brief *amicus curiae* are set forth below.

The Council is a non-profit membership corporation organized under the laws of the State of New York.

It is concerned, among other matters, with censorship movements, legislation relating to book publishing, and similar subjects in the field of public affairs of importance to the book publishing industry.

The Council's membership includes the country's leading "trade book" publishers and university presses, among them Doubleday & Company, The Macmillan Company, Charles Scribner's Sons, Oxford University Press, Harper & Brothers, Houghton, Mifflin & Company, Harcourt, Brace & Company, Random House, Inc., Simon & Schuster, Inc., Alfred A. Knopf, Inc., and the university presses of Columbia, Harvard, Yale, Princeton, North Carolina, Minnesota, Oklahoma and Stanford. (The term "trade books" comprehends all works of fiction and non-fiction except textbooks and certain technical books, but the membership of the Council also includes the publishers of a large percentage of the textbooks and technical books published in this country.)

This case involves the question whether the Board of Regents of the State of New York may constitutionally ban the exhibition of the motion picture THE MIRACLE. The Council desires to file a brief *amicus curiae* on the single point that the sacrilegious nature or content of a work is not and cannot be made the basis for banning the work or making its publication, distribution or exhibition a crime.

Although the instant case is concerned with the legal effect of a finding of "sacrilege" with respect to a motion picture (under section 122 of the Education Law of the State of New York), the implications of this Court's judgment and opinion will necessarily affect books and other publications. One of the

grounds upon which the New York Court of Appeals upheld the banning of the motion picture THE MIRACLE is that "sacrilege" falls "within the 'well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional question' "—citing *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571-572. This reasoning would permit the licensing and prior censorship of books and other publications to determine whether they contain sacrilegious matter, as well as the licensing of motion pictures.

The Council deems it a public duty to present to this Court the implications of the judgment of the New York Court of Appeals in terms of the publication of books and other reading matter, and the current pressures toward censorship of ideas. Neither the appellant nor the appellees is concerned with these phases of the appeal—but in the opinion of the Council they are of even greater importance to the citizens of the United States than the immediate issue of whether sacrilege may constitutionally serve as a basis for the censorship of motion pictures.

The Council therefore respectfully requests the permission of this Court to file the attached brief, *amicus curiae*.

Respectfully submitted,

ARTHUR E. FARMER,
Counsel for American Book Publishers Council, Inc.

Dated: April 17th, 1952.

Supreme Court of the United States.

OCTOBER TERM, 1951.

No. 522.

JOSEPH BURSTYN, INC.,

Appellant,

—against—

LEWIS A. WILSON, Commissioner of Education of the State of New York, *et al.*,

Appellees.

BRIEF OF AMERICAN BOOK PUBLISHERS COUNCIL, INC. *AMICUS CURIAE.*

Statement of the Case.

In March 1949, the Motion Picture Division of the Education Department of the State of New York, issued a license to Lopert Films, Inc. for the exhibition of the motion picture entitled THE MIRACLE. In November 1950, the same authority again issued a license for the exhibition of THE MIRACLE, this time to the appellant. On February 16, 1951, the Board of Regents of the State of New York, as governors of the Education Department, revoked the license theretofore issued under its authority. The effect of the revocation of the license was to make it a criminal offense to exhibit the motion picture publicly within the State of New York.

Section 122 of the Education Law of the State of New York provides, in pertinent part, as follows:

> "The director of the (motion picture) division or, when authorized by the regents, the officers of a local office or bureau shall cause to be promptly examined every motion picture film submitted to them as herein required, and unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime, shall issue a license therefor."

Section 244 of the Rules and Regulations adopted by the Regents in effect repeats the provisions of section 122 of the Education Law. The Regents based their revocation of the license theretofore issued under their authority upon the ground that the motion picture THE MIRACLE was sacrilegious.

The Issue.

The proposition to be argued in this brief is that section 122 of the Education Law and Section 244 of the Rules and Regulations of the Regents are unconstitutional insofar as they postulate sacrilege as a ground for refusing or revoking a license to publicly exhibit a motion picture in the State of New York—

1. Because the State thereby assumes to enforce the religious views of a group or groups within the community;

2. Because the standard prescribed is so vague and indefinite as to be incapable of application with reasonable certainty; and

3. If the Court shall conclude that motion pictures are a part of "the press" within the meaning of the First Amendment to the Constitution of the United States, said provisions contravene the constitutional guarantee of freedom of the press.

Involved in the first proposition is so much of the First Amendment to the Constitution of the United States as prohibits Congress from making any law respecting an establishment of religion or prohibiting the free exercise thereof, as applied to the several states by the Fourteenth Amendment; involved in the second proposition is the application of that part of the Fourteenth Amendment which provides that no state shall deprive any person of property without due process of law; involved in the third proposition is the prohibition against abridgment of freedom of the press, contained in the First Amendment and made applicable to the several states by the Fourteenth Amendment.

POINT I.

Sacrilege is a religious concept; the establishment of sacrilege as a basis for censorship makes the state a medium for the enforcement of religious dogma.

That "sacrilege" is a religious concept, irrespective of the precise definition to be given to the word, is implicit both in the opinions of the courts below and in the briefs of counsel. It follows that section 122 of the Education Law, by prescribing sacrilege as one of the grounds upon which a license for the exhibition of a motion picture may be refused, sets up a

religious standard for banning the exhibition of a motion picture under penalty of criminal prosecution (N. Y. Education Law, section 129). This must necessarily be so, irrespective of the extent or difficulty of the religious judgment to be formed. If it is true, as stated by this Court in both *Everson* v. *Board of Education*, 330 U. S. 1, 18, and *McCollum* v. *Board of Education*, 333 U. S. 203, 212, that the First Amendment has erected a wall between Church and State which must be kept high and impregnable, it would seem clear beyond cavil that a religious standard may not be enforced by a State.

The state's interposition of its agencies between the sensibilities of religious people and those who attack religion, either by way of lampoon and ridicule or by direct assault, is no less an attempted breach of the high and impregnable wall between Church and State because of the presumptive good motives which prompted the legislation. In *Murdock* v. *Pennsylvania*, 319 U. S. 105, Mr. Justice Douglas, delivering the opinion of the Court, said (pp. 115-116):

> "Considerable emphasis is placed on the kind of literature which petitioners were distributing —its provocative, abusive and ill-mannered character and the assault which it makes on our established churches and the cherished faiths of many of us. * * * But those considerations are no justification for the license tax which the ordinance imposes. Plainly a community may not suppress, or the state tax, the dissemination of views because they are unpopular, annoying or distasteful. If that device were ever sanctioned, there would have been forged a ready instrument for the suppression of the faith which any minor-

> ity cherishes but which does not happen to be in favor. That would be a complete repudiation of the philosophy of the Bill of Rights."

The prevailing opinions in the N. Y. Court of Appeals lay considerable stress on the fact that distributors and exhibitors of motion pictures are "engaged in selling entertainment" (303 N. Y. 258); that a motion picture is "a commercial entertainment spectacle" (303 N. Y. 259), and that religious beliefs should be protected from "purely private or commercial attacks or persecution" (303 N. Y. 259). But where the issue relates to the separation of Church and State, the question whether a motion picture is entertainment or whether it is informational, is wholly irrelevant. In *Winters* v. *New York*, 333 U. S. 507, 510, this Court held specifically, in relation to the constitutional protection for a free press, that the line between the informing and the entertaining is too elusive for the protection of that basic right. Such a distinction is no less elusive and illusory in construing that part of the First Amendment which prohibits the establishment of religion or restraints upon the free exercise thereof.

It is particularly noteworthy that in the Court of Appeals, both Judge Froessel and Judge Desmond quoted the following statement from *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571-572, as justification for upholding sacrilege as a ground for censorship:

> "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the

> lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."

Should this basis for upholding the action of the Board of Regents be sustained, then by like reasoning not only the punishment, but also the prevention, of the publication of sacrilegious books, articles and other printed matter would necessarily be upheld. There can be no logical reason advanced for preferring those provisions of the First Amendment which protect the freedom of the press over the provisions of the First Amendment which prohibit an establishment of religion. Nothing could more clearly emphasize the danger implicit in sustaining the judgment from which this appeal has been taken.

The majority opinion in the Court of Appeals argues that "the offering of public gratuitous insults to recognized religious beliefs by means of commercial motion pictures * * * constitutes in itself an infringement of the freedom of others to worship and believe as they choose" (303 N. Y. 259-260). We question the validity of this statement. But even were it to be accepted at face value, it would seem that this consideration would be far outweighed by the necessity of guarding against an invasion of the principle that "* * * both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere" (*McCollum* v. *Board of Education*, 333 U. S. 203, 212).

POINT II.

The word "sacrilege" is so vague and indefinite as to be incapable of application with reasonable certainty. It cannot be sustained, therefore, as a permissible standard in a quasi-criminal statute.

Coming before this Court as *amicus curiae*, we are especially conscious of our obligation not to burden the Court with unnecessary prolixity. Therefore, in support of this point we will merely refer this Court to the opinion of Mr. Justice Reed in *Winters* v. *New York*, 333 U. S. 507. The standard of "sacrilege" is no less vague and indefinite than the standard prescribed in the statute there considered. Because it is generally understood that less definiteness is required in a statute prescribing civil liability than in one which involves criminal penalties, we call this Court's attention to the fact that under the provisions of section 129 of the N. Y. Education Law it is unlawful to exhibit in the State of New York a motion picture subject to the license provisions of the statute, unless there is at the time in full force and effect a valid license or permit therefor, and that section 131 of the Education Law provides that a violation of the statute shall be a misdemeanor.

POINT III.

Section 122 of the Education Law imposes prior censorship upon motion pictures. If motion pictures are included within "the press", as that term is used in the First Amendment to the Constitution, then section 122 contravenes the provisions of the First Amendment prohibiting abridgement of freedom of the press.

Both the opinion of Mr. Justice Fuld in the N. Y. Court of Appeals and appellant's brief have so fully argued the point that motion pictures must, as the result of technological progress and current mores, today be considered a part of "the press", that we feel that we cannot add to what they have said. Assuming that this Court will agree with their conclusion, the statute must be construed in the same manner as if it applied to books and other publications.

So applied, there can be no doubt that such classics as Voltaire's CANDIDE, and THAIS and THE REVOLT OF THE ANGELS by Anatole France, would be banned as sacrilegious. And unless the religious sensibilities of the Mormons and the Christian Scientists are to be regarded more lightly than those of the Catholics, Mark Twain's ROUGHING IT and CHRISTIAN SCIENCE would also be proscribed. In like manner, among recent books the publication of Paul Blanshard's AMERICAN FREEDOM AND CATHOLIC POWER and COMMUNISM, DEMOCRACY AND CATHOLIC POWER would be unlawful. Once this type of censorship begins it is impossible to predict where it will end. The measure of acceptability may be the tolerance of a William

Penn or the passionate singlemindedness of a Savonarola or a John Wesley. The attempted differentiation made by Mr. Justice Froessel, in the New York Court of Appeals between a treatment of religion with contempt, mockery, scorn, ridicule and insult, and the expression of any religious or anti-religious sentiment through a *proper* use of the films (303 N. Y. 258-259), is specious. A vitriolic attack may seem to one in sympathy with the writer to be the purest expression of uncontrovertible logic, while to a follower of the religion attacked it may seem to be no more than a hurling of insults, contempt, mockery, scorn and ridicule at his most sacred religious beliefs. We cannot delimit—we cannot strangle—the right of free expression in order to spare the sensibilities of the individual.

In still another aspect the implications of the situation which have resulted in the banning of THE MIRACLE are far greater than the question of whether one motion picture film or all motion picture films may be banned as sacrilegious. It is apparent from the record that the action of the Regents revoking the license theretofore granted for the exhibition of THE MIRACLE was prompted largely by the agitation of a minority group. Yielding to this pressure, the Regents adopted a procedure which, whether legal or not, was wholly without precedent.

This course of conduct is part of a picture which is being repeated time and again throughout the country. In some communities, pressure groups of various complexions are seeking to enforce their views of Americanism upon universities and colleges by attacks upon members of their faculties; in others,

minority groups seek to cause the removal of "objectionable" volumes from the local library. Similar groups are using illegal but uncombatable boycotts and threats of boycott to remove reading matter from the shelves of retailers. Other organizations have attempted to cause the withdrawal of such literary classics as THE MERCHANT OF VENICE and OLIVER TWIST (the latter in motion picture form). In many instances, books and motion pictures are attacked not for their content, but because of the political beliefs of the persons who created them. The question is no longer the merit and the intellectual content of the work, but whether the author of the book or of the script is a Communist or a fellow-traveler, or was, at some time in the distant past, a member of an organization which, in the light of later day developments, has been branded subversive.

These facts are so notorious and today's newspapers and magazines are so replete with instances, that no one conversant with the present atmosphere in the United States can fail to recognize them. It is in the light of this miasma of censorship, repression and fear of the written and spoken word that this case comes before the Court. If our democracy is to survive, the belief that the American people are capable of considering conflicting ideas and philosophies—of rejecting those which are evil and accepting those which are in accord with the basic principles upon which this country was established and has survived—must be restored.

Conclusion.

The thought that an idea offensive to a minority group, or even to an overwhelming majority in the United States, may be banned under color of law, is foreign to the basic principles of intellectual freedom which have been written into the Constitution and proclaimed by this Court. It makes little difference whether this case be reversed upon the ground that the statute represents an illegal interference with the Constitutional guaranty of freedom of the press, or because it establishes religion by State action or permits the State by its constituted agent, the Regents, to uphold certain religious tenets as against the right of the citizenry who do not subscribe to those tenets to be addressed in words or in pictures in terms which they find acceptable. The important concept—the great issue—in this case is the preservation of intellectual freedom as the keystone of any democratic form of government.

The American Book Publishers Council, Inc. respectfully urges that the judgment of the New York Court of Appeals herein be reversed.

Respectfully submitted,

ARTHUR E. FARMER,
Counsel for American Book Publishers Council, Inc., as Amicus Curiae.

STERN & REUBENS,
Of Counsel.